

# CITY OF LONDON LAW SOCIETY

## INSURANCE COMMITTEE

Minutes of the meeting that took place at the office of Hogan Lovells International LLP, Atlantic House, Holborn Viaduct, London EC1A 2FG on Tuesday 3 September 2013 from 17:00 to 18:45.

### **Present:**

Richard Spiller – Holman Fenwick Willan LLP ("**RS**") (Chair)  
Christian Wells – Hogan Lovells International LLP ("**CW**")  
Christopher Foster - Herbert Smith Freehills LLP ("**CF**")  
Francis Mackie – Edwards Wildman Palmer LLP ("**FM**")  
Ken McKenzie – DAC Beachcroft LLP ("**KM**")  
Martin Mankabady – Mayer Brown International LLP ("**MartinM**")  
Michael Mendelowitz – Norton Rose Fulbright LLP ("**MichaelM**")  
Michelle Bramley – Freshfields Bruckhaus Deringer LLP ("**MB**")  
Philip Hill – Clifford Chance LLP ("**PH**")  
Robert Carr – Greenwoods Solicitors ("**RC**")  
Terry O'Neill ("**TO**")  
David Wilkinson – Kennedys Law LLP ("**DW**")

### **In attendance:**

Will Reddie – Holman Fenwick Willan LLP (Secretary)

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### **1. Apologies for absence**

Apologies were received from Beth Dobson, Slaughter and May ("**BD**"), Jonathan Teacher ("**JT**") and Stephen Lewis, Clyde & Co LLP ("**SL**").

### **2. Approval of minutes**

The minutes of the meetings of 12 March 2013 and 4 June 2013 were approved.

### **3. Matters arising from previous meetings**

(a) Christian Wells' report on his comments to the Land Law Committee regarding its draft standard insurance provisions for leases of commercial property

3.1 CW explained that he had made 15 to 20 comments on the draft standard insurance provisions. He said that most of his comments were matters of logic and corrections of loose language.

3.2 CW had not yet received feedback on his comments from the Land Law Committee but would send a copy of his comments to RS for circulation to the Committee.

(b) Comments received by EIOPA in response to its consultation on its Guidelines on preparing for Solvency II

- 3.3 RS noted that the Committee had agreed at its meeting in June to wait until the PRA launched a consultation on this topic before preparing a response. He said that a consultation was not expected until at least late 2013 or 2014.

(c) European Commission consultation on the Green Paper on the insurance of natural and man-made disasters

- 3.4 It was noted that the response by the Federation of European Risk Management Associations contained mainly commercial points. The Committee concluded that it would also be premature to respond to this consultation at this stage and agreed to monitor the progress of this consultation.

(d) Broker remuneration

- 3.5 RS reported that he had asked Kees van der Klugt (Director, Legal & Compliance of the Lloyd's Market Association) ("**KvdK**") whether the LMA had published a paper on broker market services agreements. KvdK had said that the LMA had not, but had provided a link<sup>1</sup> to some key issues that Reynolds Porter Chamberlain LLP ("**RPC**") had identified in April 2011 in relation to broker remuneration.
- 3.6 RS quoted two of the issues that RPC had identified: (i) that where a broker receives a fee as remuneration, a customer is entitled to assume that the broker is not receiving any other payment for the same services, so any other payment is a secret commission and (ii) if an insurer makes a payment to a broker, this could have the effect of making the broker the insurer's agent. As the insurer would be the agent of both the insurer and the customer, this would give rise to a conflict of interest and would impact on the duty of disclosure because the broker's knowledge would be imputed to the insurer.
- 3.7 RS also referred to the joint LMA and Lloyd's guidance on distribution costs, broker remuneration and additional charges. He said that this guidance was less interesting than the list of key issues and was focussed on profit commissions.
- 3.8 RS said that he was happy to pass on to KvdK any comments that the Committee had on the subject of broker remuneration, and that it may be worth inviting KvdK to a Committee meeting in 2014.
- 3.9 RS mentioned that David Hough of LIIBA ("**DHough**") was due to attend the Committee's meeting in December, at which the Committee hoped to discuss conflicts of interest, client assets and IMD2 with him. CW expected that DHough would be happy to explain particular issues but may not be able to go into too much detail or to present LIIBA's view on broker remuneration. CW stated that DHough's perspective would be interesting but that he should not be viewed as a sounding board for the Committee's views. RS agreed that it would be useful to discuss the subject and that the Committee would not ask DHough to state LIIBA's view. CW also agreed to forewarn DHough that the Committee intended to discuss the FCA's thematic review of conflicts of interest.
- 3.10 RS noted that the thematic review had been announced in a speech, and the Committee discussed whether any other information on the review had been published. CW observed that the FCA did

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<sup>1</sup> [http://www.lmalloyds.com/Web/News\\_room/LMA\\_bulletins/xLMA\\_bulletins/LTM11-013-KvdK.aspx](http://www.lmalloyds.com/Web/News_room/LMA_bulletins/xLMA_bulletins/LTM11-013-KvdK.aspx)

not seem to provide a lot of information on its thematic reviews; it would simply visit various market participants before publishing its findings.

- 3.11 The Committee discussed how the practices of brokers differed across the market, and that the practices of the "big three" were very different to those of mid-sized and smaller brokers.

(e) Update on European Insurance Contract Law reform

- 3.12 MartinM explained that the European Commission ("**Commission**") had set up an Expert Group to consider whether European insurance law should be harmonised and to examine any barriers to trade that existed due to different insurance laws in member states. MartinM was part of a working group that had been established by the Law Society to support and consult with the UK's representative in the Expert Group, Joanna Page of Allen & Overy.
- 3.13 MartinM stated the Expert Group had not been given any guidance by the Commission on the areas it should focus on, and had chosen to discuss certain insurance products and whether there was any harmonisation across the EU. The Expert Group had also looked at basic insurance principles, such as the requirement for an insurable interest, and how these principles differed between member states.
- 3.14 MartinM explained that the Expert Group was of the preliminary view that there were few barriers to trading and that the absence of harmonisation across the EU was not responsible for any barriers that did exist.
- 3.15 The Expert Group had three meetings remaining in 2013 and was due to discuss liability insurance, life insurance and motor insurance respectively at these meetings. It was also considering whether laws on professional indemnity insurance needed to be harmonised. The Expert Group was due to report to the Commission and provide suggestions for reform later this year but MartinM said that at this stage it was hard to say which issues the Expert Group's report would focus on. He also explained that achieving consensus between the members of the Expert Group could be difficult where the current regimes of member states differed substantially.
- 3.16 MartinM expected that after the next meeting he would have a better idea of the particular issues that the Expert Group's report would focus on, and the deadline for producing the report. Once the report had been received, the Commission would consider what action to take. MartinM suggested that the Commission might consider implementing a parallel European regime which parties could opt into and which would sit alongside the legal framework of each member state.

**4. Issues for discussion**

(a) EIOPA consultation on a draft report on good practices on comparison websites

- 4.1 TO said that he had read the consultation and that its proposals made good sense. MB agreed that the proposals seemed sensible, as they reflected issues that had been raised in the past by the FSA. TO also commented that the consultation was well-written. It was decided not to submit a response as there was little of substance to say.

(b) EIOPA consultation on a draft report on good supervisory practices regarding knowledge and ability requirements for distributors of insurance products

- 4.2 CW said that the report sounded esoteric as it contained "good supervisory practices". He said that it was not an area of which he had specific knowledge. MartinM said that the consultation discussed continuous professional training, which had also been raised in proposals regarding IMD2, so there may be some overlap.
- 4.3 RS said that the executive summary in the consultation suggested that it was aimed at regulators. On this basis, it was agreed that the Committee did not have the appetite to look at the consultation in more detail.

(c) European Commission consultation on insurance and compensation of damages caused by accidents of nuclear power plants

- 4.4 RS considered this to be a very esoteric subject but asked whether any Committee members were interested in the topic. CW said that as insurance was compulsory in respect of nuclear power plant accidents, the area was unlikely to give rise to lots of work for lawyers.

(d) Law Commission consultation on its 12<sup>th</sup> programme of law reform

- 4.5 RS asked whether any of the members' firms had suggested potential areas for reform to the Law Commission. MartinM said that the tax department at Mayer Brown was considering some areas which it believed could be simplified.
- 4.6 RS said that the Law Commission had issued a list of suggested areas for reform, such as sentencing, leasehold law and Welsh planning law, which generally did not fall within the scope of the Committee's mandate. As far as the Committee's main interest was concerned, the insurance contract law reform was already well underway. RS considered that the Committee may be able to engage with a reform of the law on corporate liability, although the CLLS Corporate Crime & Corruption Committee (the "**Corporate Crime Committee**") was likely to take the lead on this.
- 4.7 MB said that the Law Commission was considering moving away from the "directing mind and will" test, as it was hard to prosecute a company on this basis. MB considered that a change in the law could impact insurance providers, and KM stated that, in particular, it would affect D&O insurers. MB explained that she would alert the Corporate Crime Committee, of which she was a member, to the Law Commission's proposal as the two Committees could work in conjunction if the Law Commission decided to reform this area. RS agreed that where the Committee could provide valuable input on a consultation, it would be happy to work with the Corporate Crime Committee or any other CLLS Committee.
- 4.8 RS gave an update on the Law Commission's insurance contract law reform. He said that David Hertzell ("**DHertzell**") had hoped to come to the Committee's meeting in September or December but was unable to do so. KM said that DHertzell was planning to publish the Law Commission's final report in early 2014, so if he came to the Committee's meeting in March it would be too late for him to take on board the information that the Committee had gathered. RS agreed to speak to DHertzell and bring forward the Committee's December meeting or organise a special meeting if DHertzell would find it useful.

4.9 RS explained that two key issues which remained unresolved were the broker's liability for premiums and damages for late payment. MichaelM stated that DHertzell had discussed pre-contractual disclosure by companies at a recent BILA meeting and considered that it may be necessary to issue a consultation paper on this subject in the autumn.

4.10 CF asked whether these unresolved issues meant that the Law Commission could no longer use the procedure for uncontroversial Bills. MichaelM said that DHertzell still wanted to use this procedure. RS agreed and explained that DHertzell had said that the Law Commission would not propose to reform a particular issue (such as broker's liability for premiums or damages for late payment) if a broad consensus on the best way forward had not been reached. TO mentioned an article in the Journal of International Maritime Law in which DHertzell had confirmed this.

## **5. Monitoring of sector developments**

### (a) FCA thematic review of how UK insurance brokers manage conflicts of interest

5.1 The Committee agreed that this review had already been discussed (see paragraphs 3.9 and 3.10 above).

### (b) FCA co-operation arrangements with Lloyd's

5.2 The Committee considered that it would be useful for the PRA to enter into a co-operation agreement with Lloyd's and/or to publish details of this.

### (c) FCA report on its thematic review of motor legal expenses insurance (TR13/1)

5.3 The Committee had no comments on this report.

### (d) FCA report on its thematic review of mobile phone insurance (TR13/2)

5.4 The Committee had no comments on this report.

### (e) EIOPA annual report for 2012

5.5 The Committee had no comments on this report.

### (f) Insurance Europe letter to the European Commission setting out proposals for the treatment of non-proportional reinsurance under the Solvency II Directive implementing measures

5.6 RS stated that there was little appetite to consider Solvency II while its implementation date was still uncertain.

### (g) *Teal Assurance Company Limited v W R Berkley Insurance (Europe) Limited and another* [2013] UKSC 57

5.7 CF said that this case raised a few interesting issues. He explained that the petition for leave to appeal to the Supreme Court had contained a reference to the nature of an insurance claim as a claim for a failure to prevent the insured loss from occurring, and CF believed that Lord Mance had hoped to consider this issue in the Supreme Court. Unfortunately, the issues did not ultimately allow Lord Mance to do so. CF considered that the Supreme Court would take the opportunity to clarify the law the next time that it was asked to consider this issue.

- 5.8 CF explained that the first instance judgment had considered whether a contract of reinsurance was an insurance of the liability of the insurer, or of the underlying loss. CF reported that Mr Justice Smith had held that it was the latter, although curiously that a cause of action arose at the time the reinsured's liability to the insured was established.
- 5.9 RS asked for TO's thoughts on the case and the conclusion he had reached in his book, the "*Law of Reinsurance in England & Bermuda*". TO noted that the position would differ depending on whether the reinsurance policy in question was a property or liability policy. TO considered that there was a lack of case law on this point in the field of treaty reinsurance (although CF thought he had come across a relevant case). TO stated that the conclusion in his book was based on first principles, but there was a case in the US which had relied on this conclusion.<sup>2</sup> CF considered that judges were keen to find a case on this point in order to clarify the law.
- 5.10 RS said that, as an aside, Holman Fenwick Willan was currently handling a case on section 53 of the Marine Insurance Act 1906 (the "MIA") regarding P&I Clubs. RS had found that textbooks on the subject stated that the MIA did not accurately describe P&I Clubs, as the definition of "mutual insurance" did not refer to incorporated P&I Clubs. RS explained that Holman Fenwick Willan had obtained an opinion confirming that the wording of the MIA was incorrect but that leading counsel's view remained that the definition of "mutual insurance" in the MIA applied to incorporated P&I Clubs. RS expressed his surprise at this conclusion.

#### Other sector developments and issues for discussion

- 5.11 RS asked whether there were any other sector developments of note. He also asked members to send prior to meetings any issues that they wanted to discuss.
- 5.12 MB reported that in July the Financial Stability Board and the International Association of Insurance Supervisors had identified an initial list of nine systematically important insurers.<sup>3</sup> MB agreed to lead a discussion on this issue at the Committee's meeting in December.
- 5.13 CF reported that ARIAS was proposing to introduce a written procedure to address the cost of arbitration, which could be more expensive than court procedures. MichaelM said that ARIAS was also concerned that certain US arbitration organisations were being used in place of ARIAS, as the current ARIAS procedure was effectively a duplication of the High Court procedure. RS considered that it would be useful to discuss this issue in more detail. CF agreed to brief the Committee on this issue in December.
- 5.14 MartinM noted an EIOPA opinion on payment protection insurance which had been issued in June and was raising interest among the clients of some Committee members.<sup>4</sup> It was agreed that this issue should be discussed at the Committee's meeting in December.
- 5.15 CF said that Herbert Smith Freehills was advising AIRMIC on basis of contract clauses, and that some insurers had agreed to remove basis clauses from their contracts. Michael M noted that the

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<sup>2</sup> The case in question was *Republic Insurance Company v Banco de Seguros del Estado and Group Des Assurances Nationales*, a copy of which was subsequently circulated to the Committee members.

<sup>3</sup> See: [http://www.financialstabilityboard.org/publications/r\\_130718.pdf](http://www.financialstabilityboard.org/publications/r_130718.pdf)

<sup>4</sup> The opinion can be found at: [https://eiopa.europa.eu/fileadmin/tx\\_dam/files/publications/opinions/EIOPA\\_PPI\\_opinion\\_2013-06-28.pdf](https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/opinions/EIOPA_PPI_opinion_2013-06-28.pdf)

insurance contract law reform proposed to make basis clauses unlawful. Both CW and MichaelM reported that they did still see basis clauses in policies.

- 5.16 MB said that the FCA had made a further announcement regarding its study into insurance add-ons. MB reported that the FCA was studying, among other things, whether add-on products offered good value for money and were suitable for customers. The Committee agreed to look into insurance add-on products and to discuss them at the meeting in December.
- 5.17 FM asked whether the Committee should discuss the issue recently raised by Lloyd's regarding syndicates' compliance with sanctions. He believed that Lloyd's study had gone wider than the initial group of four syndicates that were initially being investigated. He also believed that a committee in New York was carrying out a similar investigation. PH stated that the US regulator had written to twenty non-US companies asking them to explain the amount of business that they had turned down as a result of having to comply with sanctions. MartinM was aware of a case where an insurer was prohibited from paying a claim as it would breach certain sanctions, but the insurer would have been in breach of contract if it had failed to pay the claim. MartinM noted that sanctions also impacted law firms and that, as a US firm, Mayer Brown had been unable to advise on this case.
- 5.18 FM stated that certain brokers had recently been found to have breached sanctions; these were generally brokers that were based in the US or had a US parent. As these brokers could not place business in the US, they were placing it in the UK instead. FM said that it was unclear whether the FCA was carrying out a similar review of brokers' compliance with sanctions. He expected there to be further developments in this area over the next few months.
- 5.19 The Committee considered that the investigations into compliance with sanctions were interesting but it was unsure how it could provide valuable input on the topic. RS stated that it may be an issue that could be discussed with KvdK.
- 5.20 RS summarised that at the next Committee meeting:
- (a) MB would lead a discussion on systemically important insurers;
  - (b) CF would brief the Committee on ARIAS's proposed rules;
  - (c) EIOPA's opinion on PPI would be discussed; and
  - (d) insurance add-on products would be considered in more detail.

## **6. Membership**

- 6.1 CW stated that he intended to retire from the Committee at the end of the year after being a member for 25 to 30 years, including a 3 or 4 year period as Chairman. CW reflected on the positive progress that the Committee had made during this period. CW said that he would bring Helen Chapman of Hogan Lovells to the Committee's December meeting as a proposed replacement, and agreed to circulate her CV in advance of the meeting. RS proposed a toast of thanks for CW's major contribution during his time as a member of the Committee.
- 6.2 RS noted that Catherine Hawkins ("**CH**"), Paul Wordley ("**PW**") and Charles Gordon ("**CG**") had retired from the Committee. RS recorded the Committee's thanks for CH's, PW's and CG's

contributions as members and stated that he had asked CH and CG if they wanted to nominate someone else at their respective firms who would be interested in joining the Committee.

- 6.3 As several members had recently retired and CW would be retiring soon, the Committee discussed expanding its membership, which had also been discussed at the Committee's meeting in June. RS noted that the Committee was not short of members but that the retirements offered a good opportunity to refresh the membership.
- 6.4 In June, the Committee had produced a list of significant insurance firms which did not currently have a representative on the Committee. The Committee discussed potential representatives of these firms.
- 6.5 RS agreed to approach the individuals but noted that the CLLS's preference was for the Committee to advertise generally for members, rather than to target individual firms. He had therefore agreed that the CLLS should advertise the vacancies.
- 6.6 The Committee also discussed potential members who were not at law firms. KM suggested that it might be worth approaching in-house counsel. FM said that there was a committee of Lloyd's in-house counsel and suggested that the Chair of this group could be invited to the Committee's meetings.
- 6.7 RS explained that Committee members tended to come from law firms, as in-house lawyers tended not to be CLLS members. RS explained that JT was an exception to this, as he was an individual member of the CLLS (as was TO). CW added that he was finding it more difficult to keep up with developments now that he was in-house, and considered that other in-house counsel may have the same issue.

#### Automatic termination of Committee membership for members who do not attend for twelve months

- 6.8 The Committee considered the CLLS rule providing for automatic termination of membership for members who do not attend for twelve months. The Committee discussed whether a member would be "safe" from this rule if an alternate attended in his or her place. RS explained that he or she would not, as membership of the Committee was on an individual basis, rather than a firm basis.

### **7. Future meetings**

- 7.1 RS stated that the next meeting was to be held at Herbert Smith Freehills at 17:00 on Tuesday 3 December 2013.
- 7.2 There being no other business, RS declared the meeting closed.